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November 15, 1993

By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Review of the Pioneer's Preference Rules
ET Docket No. 93-266

Dear Mr. Caton:

On behalf of Suite 12 Group ("Suite 12"), enclosed please find an original and nine (9) copies of its Comments filed in the above-referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,

Michael R. Gardner
Charles R. Milkis
Counsel for Suite 12 Group

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Review of the Pioneer's Preference Rules	ET Docket No. 93-266

To the Commission

COMMENTS OF SUITE 12 GROUP

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SUMMARY

Suite 12 Group ("Suite 12") is an entrepreneurial inventor of a revolutionary wireless cellular technology capable of offering consumers a high quality, low cost alternative to cable television and other voice and data services that can be provided through Suite 12's spectrum-efficient use of the largely fallow 28 GHz spectrum band. The Commission has acknowledged Suite 12's pioneering effort by tentatively granting Suite 12 a pioneer's preference in its Local Multipoint Distribution Service ("LMDS") rulemaking proceeding.

The pioneer's preference rules were adopted in order to encourage the provision of new technologies by rewarding innovators and entrepreneurs who bring new telecommunications technologies and services to U.S. consumers. Suite 12's innovative discovery, ensuing technological deployment, and continued research and development to expand LMDS services, are reflective of the successful catalytic role of the FCC pioneer's preference rules. However, Suite 12 strongly believes that without the continuance of the pioneer's preference rules and their reward of a market license, small businesses such as Suite 12, which the Commission's Small Business Advisory Committee has recognized play the leading roles in forging technological innovations, will lose the incentive to engage in costly research and development projects which are typically the necessary predicate to the development of a pioneering technology. Accordingly, Suite 12 firmly believes that the pioneer's preference rules serve the public interest and should be maintained because they promote competition and ensure that U.S. inventors and entrepreneurs are frontrunners in the development of the telecommunications superhighway, both within the United States and globally.

Additionally, Suite 12 believes that the proposed competitive bidding scheme enacted by Congress in no way impacts the pioneer's preference rules. In fact, the relevant provisions of the Budget Act explicitly recognize that competitive bidding provisions are not intended to prevent the Commission from making pioneer's preference awards.

Further, any attempt to obtain payment for pioneer's preference licenses is neither mandated by the Budget Act, nor is it in the public interest. Requiring such payment from small entrepreneurial pioneers like Suite 12 would undermine the purpose of the pioneer's preference rules, as small innovators, in particular, generally are without substantial operating revenue and lack the financial resources to realistically compete at an auction.

Finally, Suite 12 submits that if the Commission decides to change the pioneer's preference rules, any alterations in the rules should not be applied retroactively to the tentative grants already made by the Commission. Suite 12, the three other tentative grantees as well as the two existing pioneer's preference awardees have all relied substantially on the inducement of the Commission's pioneer's preference rules, and have competed for and passed the Commission's rigorous scrutiny of pioneer's preference applicants. Thus, to renege on the promise of a pioneer's preference to these six parties would create a great inequity that would be legally unsound. Rather, the Commission should follow its own precedent and grandfather the previously existing grants to avoid the disruptive effect that would be caused to Suite 12 and others who have committed substantial resources in reliance on the pioneer's preference rules.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266

To: The Commission

COMMENTS OF SUITE 12 GROUP

Suite 12 Group ("Suite 12"), by its attorneys, hereby files Comments in response to the above-referenced Notice of Proposed Rulemaking ("NPRM"). In the NPRM, the Commission has commenced a review of its pioneer's preference rules to assess the continued viability of these rules in a competitive bidding licensing environment, and to consider whether these rules should be amended to fit within a competitive bidding licensing scheme. Additionally, and of particular importance to Suite 12, the Commission has asked whether any changes it adopts in the instant proceeding should apply to four tentative pioneer's preference grants in pending proceedings, including the tentative award to Suite 12 in the Local Multipoint Distribution Service proceeding.[1]

As discussed below, Suite 12 believes that the prospect of issuing licenses by competitive bidding in no way adversely impacts the continuing viability of the pioneer's preference rules, nor is it inconsistent with the

[1] See Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, 8 FCC Rcd 557 (1993).

propriety of awarding pioneer's preference licenses without payment. Moreover, in view of the substantial sums of money which a pioneer typically spends on research, development and experimentation in an effort to create a new communications technology or service, and the resulting benefits to the public from enhanced communications technologies and services, Suite 12 strongly opposes the retroactive application of any changes in the rules to the four tentative grants of pioneer's preferences. Suite 12 also opposes any change in the rules which would require a pioneer to pay for a license obtained through the pioneer's preference process.

I. BACKGROUND

In 1986, Vahak Hovnanian, Shant Hovnanian and Bernard Bossard, the partners of Suite 12, began experimenting in the hope of developing a revolutionary wireless cellular technology capable of offering consumers an array of multimedia services in a high quality yet cost efficient manner in the largely fallow 28 GHz spectrum band. In 1988, Hye Crest Management, Inc. ("Hye Crest"), an affiliate owned by the Suite 12 partners, filed an application for a commercial license to construct and operate a point-to-point microwave system in the 28 GHz band offering 24 channels of video programming to consumers in the New York area. In January 1991, the Commission granted the Hye Crest request, issuing a full commercial five year license to provide service

within the New York Primary Metropolitan Statistical Area.[2]

In May 1991, the Commission adopted the pioneer's preference rules. [3] In September 1991, Suite 12 filed a Petition for Rulemaking seeking the reallocation of spectrum in the 28 GHz band and the establishment of rules for LMDS based on the CellularVision technology. In reliance on the Commission's adoption of the pioneer's preference rules, Suite 12 also filed a Petition for Pioneer's Preference in September 1991 based on Suite 12's pioneering efforts in developing a new technology and a new service. Suite 12 requested Los Angeles as its pioneer's preference market.[4]

Subsequently, in January 1993, the Commission released a Notice of Proposed Rulemaking, which proposed to reallocate the 28 GHz band for LMDS. See Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, ("LMDS NPRM"), 8 FCC Rcd 557 (1993). In the LMDS NPRM, the Commission tentatively concluded that Suite 12 should be awarded a pioneer's preference, citing the

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[2] See Hye Crest Management, Inc. ("Hye Crest Order"), 6 FCC Rcd 332 (1991). Suite 12's subsequent development of the capability to provide 50 channels of video programming resulted in the modification of the Hye Crest license in 1992.

[3] 47 C.F.R. §§ 1.402, 1.403, 5.207. See Establishment of Procedures to Provide a Preference, 6 FCC Rcd 3488 (1991), recon. granted, 7 FCC Rcd 1808 (1992), further recon. denied, 8 FCC Rcd 1659 (1993).

[4] Suite 12 had initially specified San Francisco as its preference market, but in November 1991 it amended its Petition for Pioneer's Preference to specify Los Angeles as its preference market.

following reasons:

- "Suite 12 is the innovator of the LMDS technology . . ."
- "other companies are seeking licenses to provide LMDS based on Suite 12's pioneering work."
- "No party has challenged Suite 12's claims regarding its developmental efforts."
- "the rules proposed herein are based substantially on Suite 12's proposals in its petition for rule making."

8 FCC Rcd at 566. However, the Commission stated that it believed that the service provided by Hye Crest is not substantially different from the service proposed by Suite 12 for a pioneer's preference. Id. As a result, the Commission tentatively concluded that for purposes of its pioneer's preference, Suite 12 could choose either New York or Los Angeles. Id.

In support for its request for a pioneer's preference license for Los Angeles, Suite 12 argued that the Hye Crest license should not equate to a pioneer's preference grant because Suite 12's "efforts, with respect to LMDS, occurred after the Commission granted the Hye Crest license and after the Commission adopted its [pioneer's] preference rules. See Comments of Suite 12 Group ("Suite 12 Comments"), CC Docket No. 92-297, March 16, 1993, at page 61. Moreover, the CellularVision technology for LMDS subsequently evolved into a "much broader, almost unlimited, array of two-way video, voice and data services." Id. at page 55. As such, Suite 12 stated that its development of the CellularVision technology constituted "exactly the type of technological innovation, development and testing that the Commission's [pioneer's

preference] rules were intended to encourage." Id.[5] Suite 12 concluded that to force it to choose between Los Angeles and New York for its pioneer's preference would be arbitrary, capricious and an abuse of discretion, and inconsistent with the intent of the pioneer's preference rules. Suite 12 Comments, at page 62.

In tentatively granting a pioneer's preference to Suite 12, the Commission obviously appreciated the fact that almost seven years had elapsed since entrepreneurs/inventors Vahak Hovnanian, Shant Hovnanian and Bernard Bossard first set out to develop a high quality, cost efficient wireless means of delivering an array of multimedia services to consumers in a largely unused portion of the spectrum. Consistent with the pioneer's preference criteria, the record before the FCC confirmed that the partners have invested significant time and substantial resources towards the development of a viable, innovative new technology. From the initial experiments, to the development of the capability

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[5] Suite 12 also argued that the Commission's proposed action failed to consider the impact of the proposed decision on Hye Crest's commercial operations. Suite 12 reiterated that the Commission granted Hye Crest a full-fledged commercial license, instead of developmental authority, for the following reasons:

> [R]egular authority is necessary to ensure the public continued service, to permit [Hye Crest] to amortize its construction costs and start-up expenses sufficiently to lower subscription rates to competitive levels, and to attract the amount of venture capital needed...

Suite 12 Comments, at page 59, citing Hye Crest Order at 335.

to offer 24 video channels, to the further experiments which led to the ability to offer 50 video channels, to the development of the ability to offer video, voice and data services simultaneously, to the development of two-way, interactive capability, and to current experiments involving educational and medical applications of the technology — the creation of the CellularVision technology, as it exists today, is the product of an ongoing process of research, development and experimentation, which has cost many millions of dollars. Because of the tenacious commitment of resources and vision of the founders of the CellularVision system, consumers in the New York market now, and hopefully consumers across the United States in the near future, will be able to avail themselves of a high quality, low cost alternative to cable television and other data and voice services.

II. ARGUMENT

As the record at the Commission demonstrates, Suite 12's development of the CellularVision technology from a theoretical concept to a viable technology which today is poised to emerge as a competitive alternative multimedia service on a domestic and global basis has required many years of research and development and the commitment of substantial capital. Such effort and commitment is truly extraordinary, as technological advances worthy of pioneer's status are extremely difficult to develop. With the Commission's commencement of the instant proceeding, however, Suite 12, which received a

tentative grant of a pioneer's preference, suddenly is now at risk of losing the appropriate governmental recognition and support for its efforts — efforts which have produced a communications innovation which can directly and immediately benefit consumers.[6]

As discussed below, the pioneer's preference rules serve important public interests, and there is no basis for altering the pioneer's preference rules since to do so would have the inequitable effect of denying a communications industry innovator such as Suite 12 the federally guaranteed support for undertaking the costly pioneering effort that led to the development of a technology so potentially advantageous to the U.S. public.

A. The Pioneer's Preference Rules Serve the Public Interest and Should be Maintained

The pioneer's preference rules are designed to be a regulatory catalyst for the rapid development and deployment of new technologies and services to the American public by reducing the delays and risks innovators would otherwise face in obtaining a license through the Commission's licensing processes. See NPRM, at para. 6. The pioneer's preference rules provide appropriate recognition for innovators who have developed new communications technologies or services by providing these high-tech pioneers the opportunity

[6] In reliance on the Commission's May 1991 adoption of the pioneer's preference rules, Suite 12 decided to expand its research and development and further enhance the CellularVision technology to offer new and broader services than those initially offered under the license granted to Hye Crest.

to obtain a license to offer their innovative technology or service without the added cost, delay and uncertainty of being subject to mutually exclusive applications. The pioneer's preference rules thus promote competition in the marketplace by encouraging U.S.-based entrepreneurs and inventors to commit the substantial energy and resources necessary to develop new technologies and services which can more fully utilize the valuable spectrum and enhance the services available to consumers.

In an era in which the telecommunications industry has assumed a vital role in the economies and infrastructures of countries throughout the world, the pioneer's preference rules have and will continue to provide immeasurable benefits to U.S. providers of communications equipment and related services at home and abroad. Like any preference awarded in the Commission's licensing processes, the pioneer's preference rules have the potential to be abused, and must be prudently implemented to achieve the Commission's and Congress' goals. However, if the pioneer's preference rules are utilized judiciously, and are reserved for appropriate instances of truly pioneering technological developments, the pioneer's preference rules can play a vital role in ensuring that U.S. inventors and entrepreneurs play the leading role in establishing and equipping the global telecommunications superhighway.

B. The Pioneer's Preference Rules are Consistent with the Competitive Bidding Licensing Scheme.

In the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),

Congress provided the Commission with authority to use a system of competitive bidding when mutually exclusive applications are filed for initial licenses or construction permits which will involve the use of the radio spectrum principally for subscription-based services.[7] In the NPRM, the Commission notes that since Congress has authorized the use of competitive bidding only when mutually exclusive applications are filed, and pioneer's preference applications are treated as the sole application acceptable for filing for the particular license at issue, "we believe that the statutory language, combined with our pioneer's preference regulatory scheme as it currently exists, exempts pioneer's preference licenses from payment for a license so issued." NPRM, at para. 10.

The Budget Act explicitly recognizes that the pioneer's preference rules can exist within a competitive bidding environment. The Budget Act

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[7] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, 101 Stat. 387, enacted August 10, 1993. See 47 U.S.C. §§ 309(j)(1), 309(j)(2). Presumably, the focus of the instant proceeding, how to integrate the pioneer's preference rules and competitive bidding authority, is only relevant for services in which competitive bidding will apply. The establishment of procedures for competitive bidding, and a determination which services will be subject to competitive bidding, is the subject of a separate rulemaking proceeding. See Implementation of Section 309(j) of the Communications Act Competitive Bidding ("Competitive Bidding"), PP Docket No. 93-253, Notice of Proposed Rulemaking (released October 12, 1993). In that proceeding, the Commission has proposed to issue LMDS licenses by competitive bidding. Competitive Bidding, at para. 152. However, if the Commission decides not to issue LMDS licenses by competitive bidding, the questions raised in the instant proceeding about integrating the pioneer's preference rules and competitive bidding would not seem to be relevant with regard to LMDS.

specifically provides that its competitive bidding provisions do not "prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology."[8] The Budget Act also provides that in designing competitive bidding schemes, the Commission may not base a public interest finding "solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding."[9] Accordingly, as Commissioner Barrett appropriately noted, there is no indication that the advent of competitive bidding either alters the Commission's ability to award pioneer's preference licenses, or mandates that the Commission require payment for such licenses.[10] In sum, there is nothing in the legislative scheme to indicate that the Commission must either abandon its pioneer's preference rules, or require payment from pioneer's in return for licenses awarded through the pioneer's preference process.

C. The Commission Should Not Require Payment for Pioneer's Preference Licenses

Moreover, Suite 12 submits that requiring payment for pioneer's

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[8] 47 U.S.C. § 309(j)(6)(G). The House Report states that the competitive bidding provisions are "expressly neutral" with respect to the pioneer's preference rules. H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 257 (1993).

[9] 47 U.S.C. § 309(j)(7)(B).

[10] See NPRM, Statement of Commissioner Andrew C. Barrett Dissenting in Part/Concurring in Part, at page 2. Commissioner Barrett believes that the Commission has the discretion to retain its pioneer's preference rules and to grant pioneer's preferences to applicants in any future dockets.

preference licenses will disserve both the underlying purpose of the pioneer's preference rules, and the public interest. First, as discussed above, the substantial and high risk commitment of resources which necessarily goes into the development of a new technology or service typically involves millions of dollars. For a large entity, such expenditures are more easily absorbed as research and development costs. By contrast, for small entrepreneurial inventors, like Suite 12, who typically are not operating companies generating significant revenue, these research and development costs may often constitute a substantial debt which cannot be easily absorbed. Thus, requiring payment for pioneer's preference licenses could preclude small innovators from obtaining such licenses.

Since many smaller entrepreneurial entities may exist solely by virtue of the technologies which they have pioneered, entry into the marketplace via a pioneer's preference license may provide the only means for such entities to ultimately recoup those costs. Furthermore, it should be noted that the FCC's Small Business Advisory Committee ("SBAC") recently concluded that "many technological advances in recent years have been introduced by small firms and new entrants."[11] Specifically, the SBAC found that "55% of all technological innovations are attributed to firms with less than 500 employees." The SBAC also found that "small firms innovate at a per person rate twice that of large

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[11] See Report Of The Small Business Advisory Committee To The Federal Communications Commission Regarding Gen Docket 90-314, September 15, 1993, at page 5.

firms, spend more on research and development, and translate research and development spending into new products more efficiently than large firms." Id. Thus, given the leading role that small entities play in forging technological innovations, presumably at least in part in reliance on the reward offered by the pioneer's preference rules, requiring payment for pioneer's preference licenses could discourage such entities from committing the substantial energy and resources in the first place and ultimately stunt the rate of development of new technologies.

Additionally, as noted above, the pioneer's preference rules are designed to encourage technological innovation by rewarding innovators with licenses without subjecting them to the delays and risks inherent in the Commission's licensing schemes. Under a lottery licensing scheme, the guarantee of a license via the pioneer's preference process provides an element of certainty to an innovator who otherwise would be just another applicant subject to a random selection process. While an auction scenario may result in a well-financed applicant having a greater degree of control over whether it obtains a license, an innovator still faces certain risks that it may not obtain any benefit for its pioneering efforts. While at first glance it would appear that under an auction scheme the risk of an innovator not receiving a license may be eliminated, since in theory an innovator could submit the highest and therefore successful bid, the Commission's proposed auction procedures include various types of bidding procedures under which a bidder will not have absolute control over the destiny

of its bid.[12]

Even if the auction procedure that may ultimately be adopted can ensure victory for a prospective bidder, an innovator who has already spent millions of dollars in research, development and experimentation to develop a new technology or service may not have the resources to pay market value for a license. The Commission's suggestion that an innovator will likely be able to attract the support of financial institutions and venture capitalists (NPRM, at para. 12) ignores the reality of the financial markets — financiers who offer to provide a small entrepreneur with financial support typically will expect to receive substantial equity positions in return. Thus, in the end, a small innovator may have to give up substantial ownership and control over its innovation in order to be able to successfully participate in an auction.

Clearly, subjecting an innovator to auction pricing will deny it the benefit of its pioneer's preference. If an innovator worthy of a pioneer's preference has to compete at an auction in order to obtain a license, then it has not received anything special due to its innovator status since any party could have acquired that same license by submitting the highest bid at the auction. Under these

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[12] For example, to the extent the Commission adopts sealed bidding procedures, a bidder could lose out without having the opportunity to make a counter-offer. Likewise, in a combined bidding scheme, the highest bidder for an individual license in an oral auction could ultimately lose out to a higher, group bid submitted in a sealed bid auction, even if the Commission adopts a second round, sealed bid counteroffer scheme. Certainly, these are just a few of the possible instances in which a confident bidder would not be able to control its destiny. See Competitive Bidding, III. "Auction Design".

circumstances, the ultimate reward of the pioneer's preference rules, which fuels technological development and innovation, will be eviscerated.

If, however, the Commission somehow determines that it may require payment from pioneer's preference recipients, Suite 12 submits that such payment must represent a substantial discount under the market value of a license — otherwise, the contribution of the innovator will be ignored, and the purposes and benefit of the pioneer's preference award will be frustrated. For example, the Commission has proposed that if a party designed as a pioneer submits a winning bid at an auction, that it might be required to pay only 75 percent of the bid. NPRM, at para. 12. Suite 12 believes that a 25 percent discount is grossly inadequate, and will not provide a pioneer with a meaningful benefit. Additionally, as discussed above, in an attempt to obtain the capital necessary to pay its bid, even if discounted, a small innovator without substantial revenues would likely be forced to give up a significant amount of ownership and control over its innovation in return for the necessary financial backing. Requiring anything in excess of a nominal payment for a pioneer's preference license simply will be too burdensome for small entrepreneur/innovators who have capital constraints due to the substantial front-end costs of developing their pioneering technologies.

Moreover, in an auction of LMDS licenses, larger entities, and particularly cable and telephone companies, will have the incentive to hoard licenses in order to either dominate the new service or alternatively, to kill the

new service in order to protect their incumbent services from competition; as a result, such entities can be expected to utilize their substantial resources in order to outbid other interested parties. Under such circumstances, a pioneer such as Suite 12 simply will not be able to outbid the large cable and telco companies. No license fee or, at most, a nominal payment, is the only licensing approach that will allow a pioneer the opportunity to obtain a license for its efforts.[13]

D. Any Changes to the Pioneer's Preference Rules Adopted in the Instant Proceeding Should Not be Applied Retroactively to the Tentative Grants of Pioneer's Preferences

As discussed above, Suite 12 firmly believes that the pioneer's preference rules serve the public interest, are consistent with Congressional intent in authorizing spectrum auctions, and that pioneer's should not be required to pay for licenses obtained through the pioneer's preference process. However, if the Commission decides to eliminate or alter significantly the pioneer's preference rules in this proceeding, equity demands that the tentative grants made in several proceedings, including the grant to Suite 12 in the LMDS proceeding, be

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[13] In response to the Competitive Bidding NPRM, Suite 12 filed Comments in which it argued that if the Commission decides to issue LMDS licenses by competitive bidding, it must, at a minimum, adopt certain specific safeguards in order to ensure that its auction procedures will fulfill the explicit Congressional intent of promoting small business, preventing the concentration of licenses, ensuring competition by licensing a wide variety of applicants and supporting the development of new technologies. Among the safeguards proposed by Suite 12 was the prohibition on incumbent spectrum users in competing services (cable, broadcast and telephone) from acquiring controlling interests (i.e., no greater than 49% ownership) in LMDS applicants or licensees.

grandfathered from any such changes in the rules. To change course midstream, and eliminate the promised reward for those who have been induced to make the enormous commitment of resources to qualify for this governmental catalyst of competition, will cause a severe injustice, particularly to smaller entrepreneurial inventors such as Suite 12, which has invested millions of dollars over a number of years in developing a revolutionary new technology and service in order to provide a new, competitive communications service to the American public.[14]

Traditionally, when the Commission has changed its rules or policies in a manner that would adversely affect or jeopardize existing authorizations, it has grandfathered those existing authorizations in order to avoid the disruption and injustice that would otherwise result from the retroactive application of its new

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[14] In this regard, the Commission stated in the NPRM that "as a matter of equity," the current review of the pioneer's preference rules will not affect pioneer's preferences which have been granted to Volunteers in Technical Assistance ("VITA") and Mobile Telecommunication Technologies Corporation ("Mtel") in two different proceedings. See NPRM, at para. 18. However, in view of the fact that the four pending tentative grants generally involved the same reliance on the pioneer's preference rules and substantial commitment of resources by the four recipients of the tentative pioneer's preference grants, the Commission must apply the same equitable treatment to the tentative awardees as it proposes to apply to the two permanent awardees of pioneer's preferences. The four tentative awardees, who, like the two permanent awardees, have relied on the pioneer's preference rules and who have passed the close Commission scrutiny that resulted in those tentative awards, should not be punished simply because various rulemaking proceedings have not been fully completed by a certain date. Moreover, the fact that Congress enacted the competitive bidding authority on a certain date should not be dispositive, as Suite 12's substantial commitment in reliance on the pioneer's preference rules pre-dated the possibility of issuing licenses by auctions. Finally, it is noteworthy that while the Commission has rejected numerous applicants for pioneer's preferences in various proceedings, the Commission has awarded a final pioneer's preference to every party that has been awarded a tentative pioneer's preference.

rules.[15]

The Supreme Court has held that retroactive enforcement of a rule is improper "if 'the ill effect of the retroactive application' of the rule outweighs the 'mischief' of frustrating the interests the rule promotes."[16] Factors to be considered when balancing the hardship created by retroactive application of a new rule against the public interest considerations sought to be promoted, include whether the rule represents an abrupt departure from established practices, the extent to which a party relied on the former rule, the degree of the burden imposed, and the statutory interest in applying a new rule.[17] In the instant case, the "ill effect" or hardship on Suite 12 of retroactive enforcement of changes to the pioneer's preference rules adopted in this rulemaking proceeding would be severe as Suite 12 has relied on the expected benefits of the rule in developing business strategies and in expending resources.

By comparison, prohibiting retroactive effect of a changed pioneer's preference scheme would not cause any "mischief." If the Commission determines that changes to the pioneer's preference rules (ranging from minor

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[15] For example, in establishing its cable television/television broadcast station cross ownership restrictions, the Commission accorded permanent grandfathered status to those cross ownership interests which existed prior to the enactment of the rules. See Second Report and Order in Docket 20423, FCC 75-1066, 55 FCC 2d 540 (1975).

[16] Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554 (D.C. Cir. 1987), citing SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

[17] See Retail, Wholesale and Department Store U. v. N.L.R.B., 466 F.2d 380, 390 (1972).

alternations, to elimination) are warranted, the continued application of the current rules to the few pending cases in which tentative grants have been made to innovators who relied on those current rules would cause no mischief or harm, nor frustrate the Commission's purpose underlying the decision to change the rules. In other words, retroactive application of the new rules would in no way further the Commission's purpose in adopting those rules. Thus, in this case, retroactive application of a changed pioneer's preference rule to Suite 12 and the other tentative grantees would be clearly improper, as the burden certainly outweighs the Commission's interest in applying the new rule retroactively.

Suite 12 urges the Commission to remain steadfast and follow a reasoned approach by concluding that any changes in the pioneer's preference scheme adopted in the instant proceeding will not be applied retroactively to Suite 12 and the other tentative pioneer's preference grantees. In the case of the pioneer's preference rules, the grandfathering of those tentative grants is consistent with the approach generally taken by the Commission and reflects the appropriate determination that those who have expended substantial resources and time in reliance on the award promised by the pioneer's preference rules should not retroactively be denied the expected benefit of that effort.

In the Budget Act, Congress has mandated that the Commission promote the rapid deployment of new technologies and services to the public without administrative delay. See 47 U.S.C. §309(j)(3). Suite 12 believes that the

pioneer's preference rules clearly encourage the rapid development and deployment of new technologies by providing U.S. inventors a tangible reward for their pioneering efforts. If the Commission alters its pioneer's preference rules, and reaches back retroactively to renege on the tentative grants, the result will be considerable, unnecessary delay and waste in deploying these services as administrative appeals and protracted litigation are sure to ensue over the inequities of such action.

III. Conclusion

Based on the foregoing, Suite 12 Group submits that there is no basis in the instant proceeding for altering the pioneer's preference rules. The pioneer's preference rules serve the important purpose of encouraging U.S. technological innovation, and are consistent with a competitive bidding licensing scheme. Moreover, the pioneer's preference rules constitute a definitive pro-competitive public policy tool of the Commission, explicitly endorsed by Congress, to ensure U.S. high tech dominance in the global marketplace. If properly used, the rules can assist U.S. inventors in establishing and equipping the global telecommunications superhighway for the 21st Century.

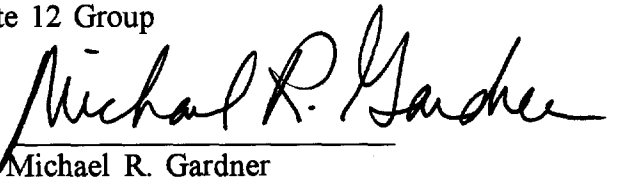
Suite 12 cautions that should the Commission either eliminate the pioneer's preference rules or amend the rules to require payment for pioneer's preference licenses, the incentive for potential innovators, especially smaller entities, to engage in research and development will be gone. The ultimate

loser, in that case, will be the U.S. public, which stands to benefit the most from advances in technologies and services.

Finally, Suite 12 submits that the Commission should not retroactively apply changes to the pioneer's preference rules adopted in this proceeding to the four tentative pioneer's preference grants previously made in other proceedings. These four tentative awardees have relied substantially on the pioneer's preference rules and have passed the same Commission scrutiny which led to the permanent award of pioneer's preferences to two parties in other proceedings. To deny the four tentative awardees the same equitable treatment afforded the two other awardees would be grossly unjust and legally unsound. Moreover, to act retroactively would constitute bad public policy, delay the deployment of important pioneering technologies and seriously prejudice those parties, such as Suite 12, who have committed substantial resources to technological experimentation and development in reliance on those rules.

Respectfully submitted,

Suite 12 Group

By: 

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